Comment

Attacking the Negligence Rule in Defamation of Private Plaintiffs: *Embers Supper Club v. Scripps Howard Broadcasting Co.*

I. Introduction

The interest in free speech and press and the interest in reputation are often at odds. The first amendment to the Constitution of the United States prohibits any law "abridging the freedom of speech, or of the press."[1] Until 1964, however, the Supreme Court held that defamatory utterances,[2] which damaged an individual's reputation interest, were outside the scope of the first amendment.[3] Therefore, states defined their own standards of liability, often resorting to common law principles such as strict liability, tempered by various common law privileges.[4] The United States Supreme Court altered this framework in 1964 by entering the area of defamation. In a series of decisions, the Court established a constitutional privilege for certain defamatory statements;[5] however, this privilege subsequently was curtailed in *Gertz v. Robert Welch, Inc.*[6] Currently, the Supreme Court requires a plaintiff who is a public official or a public figure[7] to prove actual malice[8] to maintain an action for defamation, while individual states define the standard for private plaintiffs, with actual malice not being a prerequisite to liability.[9]

Recently, in *Embers Supper Club v. Scripps Howard Broadcasting Co.*,[10] the Supreme Court of Ohio adopted the simple negligence standard of liability in the context of a private citizen plaintiff. This Case Comment will critique the simple negligence rule adopted in *Embers Supper Club*, and propose alternatives for Ohio and the entire United States. These proposals will focus on the proper balance for the law to strike between the competing interests of a free press[11] and personal reputation.

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1. U.S. Const. amend. I.

2. *See infra* text accompanying notes 20–36.

3. Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

4. *See* W. Prosser and W. Keeton, Law of Torts, §§ 114, 115, at 815–39 (5th ed. 1984) [hereinafter cited as Prosser & Keeton].

5. *See infra* text accompanying notes 37–54.

6. 418 U.S. 323 (1974). *Gertz* dealt with private plaintiffs. *Id. See infra* text accompanying notes 55–58.

7. *See infra* text accompanying note 47.

8. *See infra* text accompanying note 39.

9. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). *See infra* text accompanying note 58.

10. 9 Ohio St. 3d 22, 457 N.E.2d 1164, *cert. denied*, 467 U.S. 1226, (1984).

11. Since *Embers Supper Club* dealt with a traditional media defendant (i.e., a newspaper), this Comment will deal for the most part with arguments raised in the context of a media defendant. The author is not asserting, however, that "non-media" defendants deserve lesser first amendment protection. As Justice White noted in his concurrence in Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S. Ct. 2939, 2953 n.4 (1985), the informative function performed by the press also is performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. In fact, a majority of the *Greenmoss* Court found that the rights of the institutional media are "no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *See id.* at 2959 (Brennan, J., dissenting) (This majority

II. *Embers Supper Club v. Scripps Howard Broadcasting Co.*

Embers Supper Club[12] presented the Supreme Court of Ohio with the opportunity to delineate a standard of review for defamation suits involving private plaintiffs. Embers Supper Club brought suit against Scripps-Howard Broadcasting Company because of two broadcasts aired on Cincinnati television station WCPO-TV which allegedly linked the Supper Club to organized crime.[13] The broadcasts resulted from a police raid of the Supper Club, in which police seized Daily Racing Forms, Kentucky Sports Bulletins, and betting slips.[14] The inaccuracy alleged in the first broadcast was an unsubstantiated connection of Embers with a known organized crime establishment. In addition, the second broadcast added the term "bookie," a term which had not been used in the police report.[15]

The trial court granted a directed verdict in favor of the defendant, and the Court of Appeals affirmed.[16] The Supreme Court of Ohio, however, reversed the directed verdict and remanded the case for a new trial.[17] The court established for the first time a standard of review for defamation actions involving private individuals and the media.[18] The standard adopted by the court was: "[W]here a prima facie showing of defamation is made by the plaintiff, the question which a jury must determine by a preponderance of evidence is whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication."[19]

III. Defamation from Common Law to the Present

A. *Common Law*

An action for defamation[20] seeks to recover for damage done to reputation and good name.[21] The Second Restatement of Torts defines a communication as defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with

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included the four Justices in dissent and Justice White in concurrence.). This Comment simply uses the institutional media as the most obvious example of the need for greater first amendment protection.

12. 9 Ohio St. 3d 22, 457 N.E.2d 1164, *cert. denied*, 467 U.S. 1226, (1984).

13. *Id.* at 23, 457 N.E.2d at 1165.

14. *Id.*

15. *Id.* As a result of the police raid at Embers Supper Club, a cook was cited for a gambling offense, but his case was dismissed. No one else at Embers was charged with any gambling offense. *Id.* at 23, 457 N.E.2d at 1166.

16. Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co., No. C–810708, slip op. at 7 (Ohio Ct. App. Oct. 20, 1982).

17. Embers Supper Club v. Scripps-Howard Broadcasting Co., 9 Ohio St. 3d 22, 26, 457 N.E.2d 1164, 1168, *cert. denied*, 467 U.S. 1226 (1984).

18. See Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (Ct. App. 1974), in which an Ohio court of appeals adopted the simple negligence rule prior to the decision in *Embers Supper Club*.

19. Embers Supper Club v. Scripps-Howard Broadcasting Co., 9 Ohio St. 3d 22, 25, 457 N.E.2d 1164, 1167, *cert. denied*, 467 U.S. 1226, (1984).

20. The law of defamation embraces both the torts of libel and slander. Libel is the "publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." Restatement (Second) of Torts § 568 (1) (1977). Slander is the "publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1)." *Id.* at § 568 (2). Broadcasting of defamatory material by means of radio or television is considered libel. *Id.* at § 568A.

21. Prosser & Keeton, *supra* note 4, § 111, at 771.

him.[22] The common definition used in Ohio is a "false and malicious publication made with the intent to injure a person's reputation or to expose him to public hatred, contempt, ridicule, shame or disgrace, or to affect him adversely in his trade or profession."[23] To constitute defamation, the communicator must convey the information to some third person, since defamation is concerned with the opinion members of the community have toward the plaintiff.[24] Therefore, insults to the plaintiff, if not communicated to others, provide no basis for a defamation suit. A public communication, such as in a newspaper or through radio or television, is presumed to reach the requisite audience.[25] The question of whether or not a given statement is defamatory is for the court to decide.[26]

At common law, a libel plaintiff was able to recover simply by proving that the defendant was responsible for publishing[27] a defamatory statement.[28] Malice,[29] which at common law was defined as spite or ill will,[30] was implied as a matter of law from publication.[31] Once a plaintiff made out a prima facie case, the defendant could avoid liability only by proving that the statement was substantially true or that it was privileged.[32] Examples of absolute privileges included judicial proceedings, legislative proceedings, and executive communications.[33] A qualified privilege, which conferred immunity when publication was made in a reasonable manner and for a proper purpose, was accorded to fair comment on matters of public concern.[34] The privileges were narrowly defined,[35] however, and common law rules thus effectively imposed strict liability upon defamation defendants.[36]

B. *Supreme Court Cases*

In 1964 the Supreme Court of the United States began to attack the concept of liability without fault in defamation actions by constitutionalizing the common law

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22. RESTATEMENT (SECOND) OF TORTS, § 559 comments c, e (1977).

23. Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 107, 334 N.E.2d 494, 497 (Ct. App. 1974).

24. PROSSER & KEETON, *supra* note 4, § 111, at 771.

25. *Id.* § 111, at 774.

26. *Id.*

27. As used in the law of defamation, a "publication" is a written publication or an oral statement. *Id.* § 113, at 797.

28. Burton v. Crowell Publishing Co., 82 F.2d 154 (2d Cir. 1936); Upton v. Times-Democrat Publishing Co., 104 La. 141, 28 So. 970 (1900). *See generally* PROSSER & KEETON, *supra* note 4, § 113, at 808.

29. "Malice" should not be confused with the actual malice standard formulated in New York Times v. Sullivan, 376 U.S. 254 (1964). *See infra* text accompanying note 39.

30. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 (1975).

31. PROSSER & KEETON, *supra* note 4, § 113, at 808. Before 1825, malice was an essential element of a plaintiff's case. In Bromage v. Prosser, 107 Eng. Rep. 1051 (K.B. 1825), the court held that malice would be implied from publication. *See* Eaton, *supra* note 30, at 1353 n.15.

32. Eaton, *supra* note 30, at 1353.

33. PROSSER & KEETON, *supra* note 4, § 114, at 816–24.

34. *Id.* § 115, at 831. A qualified privilege was defeated by proof that the defendant had published the statement with malice, or by proof that defendant knew the statement was false or had no reasonable belief in its truth. Eaton, *supra* note 30, at 1353–54.

35. Eaton, *supra* note 30, at 1353–54.

36. PROSSER & KEETON, *supra* note 4, § 113, at 808.

fair comment rules as applied to government officials.[37] In that year, the Court declared in *New York Times Co. v. Sullivan*:[38]

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[39]

The Court later defined reckless disregard as "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."[40]

In finding a constitutional protection for certain defamatory falsehoods, the Court ignored earlier dicta indicating that the first and fourteenth amendments gave no constitutional protection to defamatory statements.[41] In *Chaplinsky v. New Hampshire*,[42] the Court had stated: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words[.]'"[43] This extension of constitutional protection in *New York Times* thus created a new theory concerning the applicability of the first amendment to defamation actions.

This new theory was expanded in *Curtis Publishing Co. v. Butts*,[44] in which the Court held that communications concerning persons deemed to be public figures were to be accorded the same *New York Times* malice protection as those concerning public officials.[45] The scope of the protection exceeded that given public officials, however, because it extended to communications about public personalities "with respect to public issues and events,"[46] not just with respect to public personalities' conduct. The Court defined a public figure as one who "may have attained the status by position alone . . . [or] by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[47]

The result in *Butts*, as in *New York Times*, was based on the status of the plaintiff. In a further expansion of constitutional protection, the Court, in *Rosenbloom v. Metromedia, Inc.*,[48] discarded the status argument, and held that the

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37. *See* Silver, *Libel, The "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV. 1065, 1065; Eaton, *supra* note 30, at 1366 (citing Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908)).

38. 376 U.S. 254 (1964).

39. *Id.* at 279–80.

40. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

41. *See generally* Beauharnais v. Illinois, 343 U.S. 250, 256–57 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931).

42. 315 U.S. 568 (1942).

43. *Id.* at 571–72.

44. 388 U.S. 130 (1967).

45. The plaintiff, Wally Butts, was the athletic director and former football coach of the University of Georgia. *Id.* at 135. Butts alleged that he had been defamed by an article in the *Saturday Evening Post* accusing him of conspiring to "fix" a football game between the University of Alabama and the University of Georgia. *Id.* at 135–37. The Court concluded that, by virtue of his position, Butts was a public figure. *Id.* at 155.

46. *Id.* at 162 (Warren, C.J., concurring).

47. *Id.* at 155.

48. 403 U.S. 29 (1971).

constitutional privilege extended to all communications concerning matters of public or general interest, without regard to the status of the persons involved.[49] The Court shifted its focus from the plaintiff to the event itself, reasoning that "the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."[50] The Court eliminated distinction between private and public persons, because a matter which is of public concern remains so, whatever the status of the person involved.[51]

Free speech and press rationales underlined the *Rosenbloom* expansion. The Court found that self governance in the United States requires free and open debate on issues beyond those concerning official activity of the government and those concerning public figures.[52] The Court was dissatisfied with the rule allowing private citizens to obtain damage judgments on the basis of a jury finding of simple negligence because such a rule "would not provide adequate 'breathing space'"[53] for the first amendment freedoms. The Court felt that this lack of breathing space ultimately would lead to self censorship; more specifically, freedom of speech and press would be greatly impaired.[54]

The Court retreated from this broad position, however, in *Gertz v. Robert Welch, Inc.*[55] by again distinguishing between public and private individuals. The Court based this distinction upon the assumption that individuals who project themselves into public view intentionally run the risk of more exacting scrutiny and thus should not be able to recover for defamation in the absence of actual malice. Private citizens, however, should be treated differently, since they had not intended to receive the notoriety and thus are more sympathetic victims of defamation.[56]

Another, lesser consideration in *Gertz* was the assumption that public individuals have greater access to communication channels than private persons, and so are better able to counter defamatory falsehoods.[57] Under the *Gertz* analysis, publications concerning public officials and public figures continued to be protected by the actual

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49. *Id.* at 43–44.

50. *Id.*

51. *Id.*

52. *Id.* at 41. The Court quoted Thornhill v. Alabama, 310 U.S. 88, 102 (1940) for the proposition that: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.*

53. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971).

54. *Id.*

55. 418 U.S. 323 (1974).

56. *Id.* at 344. The plaintiff, Gertz, was a prominent Chicago civil liberties lawyer, who had been retained by the family of a murder victim to represent them in civil litigation against the convicted murderer, a Chicago policeman named Nuccio. *Id.* at 325. Gertz brought a libel action against the defendant publishing company for an article covering the Nuccio murder case, in which Gertz was labelled a "Leninist" and a "Communist-fronter," and was falsely accused of having a criminal record. *Id.* at 326.

In determining whether he was a public figure, the Court found that Gertz was well known in some circles, as he was active in community affairs, had served as an officer of local civic groups, and had published numerous books and articles on legal subjects. *Id.* at 351. However, the Court concluded that Gertz was not a public figure, since he had taken no part in the criminal prosecution of Officer Nuccio and had never discussed the criminal or civil litigation with the press. *Id.* at 352. In short, the Court determined that Gertz "did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id. See infra* text accompanying notes 99–128 for a discussion of the public figure doctrine.

57. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

malice standard of *New York Times*. The standard used for communications concerning private individuals, however, was left by the Court to the discretion of the states, so long as strict liability was not imposed. Absent a showing of actual malice, damages were limited to actual injury; presumed and punitive damages could not be recovered.[58] Thus, while the actual malice standard still could be used in cases involving private individuals, it was no longer constitutionally mandated. The Court believed that *Rosenbloom* had expanded the constitutional protection too far, and that the competing interest in reputation deserved greater emphasis. *Gertz*, therefore, can be viewed as a shuffling of the competing values of free press and reputation, with a new balance being struck in favor of reputation.[59]

Recently, the Supreme Court further restricted its view of the first amendment in *Dun & Bradstreet, Inc. v. Greenmoss Builders*.[60] The Court held that the recovery of presumed and punitive damages by private plaintiffs in defamation cases in the absence of a showing of actual malice does not violate the first amendment when the defamatory statements do not involve matters of public concern.[61] The Court thus reinserted *Rosenbloom*'s "matters of public concern"[62] concept into the law of defamation but only in the context of whether or not to allow presumed and punitive damages. The Court's rationale was that speech on purely private matters is of lesser first amendment concern.[63] A majority of the Court also refused to draw any legal distinctions based on the media or nonmedia status of the defendant.[64]

C. *State Court Response to* Gertz

In response to *Gertz*, a majority of states have opted for the simple negligence standard in cases in which the plaintiff is a private figure.[65] For the most part, the

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58. *Id.* at 347–50.

59. *See* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 200 (1976).

60. 105 S. Ct. 2939 (1985).

61. *Id.* This holding specifically overruled one of the holdings in *Gertz*. *See supra* text accompanying note 58.

62. *See supra* text accompanying notes 48–51.

63. Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S. Ct. 2939, 2943 (1985).

64. *See id.* at 2959 (Brennan, J., dissenting) (This majority consisted of the four Justices in dissent and Justice White in concurrence.).

65. In the following cases, courts in 31 states and the District of Columbia apparently have adopted the *Gertz* standard of negligence: Mead Corp. v. Hicks, 448 So. 2d 308 (Ala. 1983); Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977); Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980); Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (Super. Ct. 1975); Re v. Gannett Co., 480 A.2d 662 (Del. Super. Ct.), *aff'd*, 496 A.2d 553 (Del. 1984); Miami Herald Publishing Co. v. Ane, 458 So. 2d 239 (Fla. 1984); Triangle Publications, Inc. v. Chumley, 253 Ga. 179, 317 S.E.2d 534 (1984); Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); Wattigny v. Lambert, 408 So. 2d 1126 (La. Ct. App. 1981), *cert. denied*, 457 U.S. 1132 (1982); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975), *cert. denied*, 462 U.S. 1111 (1983); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983); Madison v. Yunker, 180 Mont. 54, 589 P.2d 126 (1978), *cert. denied*, 461 U.S. 945 (1983); McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493, *cert. denied*, 454 U.S. 1017 (1981); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982); Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (Ct. App. 1976); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Bank of Oregon v. Independent News, Inc., 65 Or. App. 29, 670 P.2d 616 (Ct. App. 1983), *aff'd*, 298 Or. 434, 693 P.2d 35, *cert. denied*, 106 S. Ct. 84 (1985); Jones v. Sun Publishing Co., 278 S.C. 12, 292 S.E.2d 23 (1982), *cert. denied*, 459 U.S. 944 (1982); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978); Foster v. Laredo Newspapers, Inc., 541

states have used the policy considerations of *Gertz* in formulating their standards. For example, in *Taskett v. King Broadcasting Co.*,[66] the Washington Supreme Court followed *Gertz* and rejected the defendant's claim that a negligence standard would have a "chilling effect" on the press; the court declared that the state had an "overriding interest in providing a realistic remedy to an otherwise helpless private citizen . . . [and that] this newly announced standard does not require the media to guarantee the absolute accuracy of their publications . . . ."[67]

Section 580B of the Second Restatement of Torts has adopted a negligence standard as well:

> One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
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> a) knows that the statement is false and that it defames the other,
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> b) acts in reckless disregard of these matters, or
>
> c) *acts negligently in failing to ascertain them.*[68]

While a majority of states and the Second Restatement have adopted a simple negligence formula for private plaintiffs, some states have rejected this standard. The courts in these states have employed three different approaches in rejecting the negligence standard. In *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*,[69] the Indiana Court of Appeals retained the *Rosenbloom* public interest test.[70] The court found that "the uncertainty attendant upon a reasonable care standard would charge the press with the '[i]ntolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture, or portrait.'"[71] In rejecting the negligence standard, the Indiana court attacked the distinction made in *Gertz* between public and private individuals, finding that the distinction made no sense in terms of the constitutional guarantees of free speech and press.[72] The court found that the primary function of

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S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981); Colombo v. Times-Argus Ass'n, Inc., 135 Vt. 454, 380 A.2d 80 (1977); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W. Va. 1983); Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141 (1982), *cert. denied*, 459 U.S. 883 (1982); Phillips v. Evening Star Newspaper Co., 424 A.2d 78 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 989 (1981).

In the following cases, federal courts have interpreted state law in three additional states as having adopted *Gertz*: Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981) (applying Mississippi law); Mathis v. Philadelphia Newspapers, Inc., 455 F. Supp. 406 (E.D. Pa. 1978) (applying Pennsylvania law); Mills v. Kingsport Times-News, 475 F. Supp. 1005 (W.D. Va. 1979) (applying Virginia law).

For a complete survey, including analysis of each state, *see* 3 LIBEL DEFENSE RESOURCE CENTER 50 STATE SURVEY 1984 (H. Kaufman ed. 1984).

66. 86 Wash. 2d 439, 546 P.2d 81 (1976).

67. *Id.* at 446–47, 546 P.2d at 86.

68. RESTATEMENT (SECOND) OF TORTS § 580B (1977) (emphasis added).

69. 162 Ind. App. 671, 321 N.E.2d 580 (Ct. App. 1974).

70. *Id.* at 686, 321 N.E.2d at 590. For an explanation of the *Rosenbloom* public interest test, *see supra* text accompanying notes 48–54.

71. Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 683, 321 N.E.2d 580, 588 (Ct. App. 1974) (quoting Time, Inc. v. Hill, 385 U.S. 374, 389 (1967)).

72. *Id.* at 681–82, 321 N.E.2d at 587.

these guarantees was "the encouragement of discussion and commentary on public issues."[73] The *Aafco* court further held that every citizen assumes the risk of media comment when he becomes involved in a matter of general concern.[74] Since the status of the plaintiff did not determine whether an issue was of public concern, the court concluded that the reputation of public persons and private persons deserved identical treatment.[75] The *Aafco* court also attacked the *Gertz* assertion that public figures had greater access to the media to respond to defamatory material by noting that it was rare for a public official or public figure to have reached such a state of prominence as to be able to meaningfully rebut a defamatory attack.[76] Instead of expanding the right to sue for defamation, the court proposed the passage of legislation to create a limited right to respond to defamatory material.[77] Finally, the court rejected the argument that courts should not decide what matters are relevant to free expression, declaring that "courts have traditionally assumed the role of ultimate arbiters of disputes concerning conflicting constitutional policies."[78]

A different approach was taken by the Illinois Supreme Court in *Colson v. Stieg*,[79] but with similar results. The *Colson* court, while professing to follow the

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73. *Id.*

74. *Id.* at 682, 321 N.E.2d at 588.

75. *Id.*

76. *Id.* at 681, 321 N.E.2d at 587.

77. *Id.* at 681–82, 321 N.E.2d at 587. See also Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U. L. REV. 375, 388–89 (1981) for a general treatment of right of reply statutes.

78. Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 686, 321 N.E.2d 580, 590 (Ct. App. 1974). In addition to *Aafco Heating*, several other courts appear to have adopted the *Rosenbloom* standard, although there are conflicting decisions in some of these states. In Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103 (Colo. 1982), *modifying* Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975) the Supreme Court of Colorado fully adopted the *Rosenbloom* standard.

In Peisner v. Detroit Free Press, Inc., 82 Mich. App. 153, 266 N.W.2d 693 (Ct. App. 1978) a Michigan court of appeals held that a "public interest privilege" existed in Michigan where a private citizen sued for defamation. This privilege is only defeated by proof of "actual malice," as defined in *New York Times*. *Id.* at 159, 266 N.W.2d at 698.

In Gay v. Williams, 486 F. Supp. 12 (D. Alas. 1979), the Federal District Court in Alaska interpreted state law to require a showing of actual malice by a private citizen plaintiff. *Id.* at 16–17. *But see* Green v. Northern Publishing Co., 655 P.2d 736 (Alas. 1982), *cert. denied*, 463 U.S. 1208 (1983), where the Supreme Court of Alaska implied that the actual malice standard might apply only to public officials.

Finally, in Rollenhagen v. City of Orange, 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (Ct. App. 1981), a California appellate court held that California's common law "public interest" privilege, as codified in CAL. CIV. CODE § 47(3) (West Supp. 1981) was still the law in the state. In all matters concerning the "public interest," a private plaintiff must prove "malice," which in California is ill will or reckless disregard of a plaintiff's rights. In a more recent case, another California court of appeals held that to demonstrate "malice" under CAL. CIV. CODE § 47(3) (West Supp. 1981), a plaintiff must show that the defendant either (1) acted with hatred or ill will, or (2) lacked reasonable grounds for believing the truth of the statements, or (3) made the statement for a reason other than to protect the interest of the one to whom the communication was made. Manguso v. Oceanside Unified School District, 153 Cal. App. 3d 574, 580–81, 200 Cal. Rptr. 535, 539 (Ct. App. 1984). Another California court of appeals, in dictum, indicated a pure negligence standard should be applied. Widener v. Pacific Gas & Electric Co., 75 Cal. App. 3d 415, 142 Cal. Rptr. 304 (Ct. App. 1977), *cert. denied*, 436 U.S. 918 (1978). See Comment, *Private Plaintiffs and the Public Interest*, 33 HASTINGS L.J. 985 (1982) for a discussion of California law and particularly *Rollenhagen*.

79. 89 Ill. 2d 205, 433 N.E.2d 246 (1982). *Colson* involved a non-media defendant but is still an important decision in the area of defamation. In Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975), the Supreme Court of Illinois had adopted a "reasonable grounds" standard in the context of a private figure plaintiff. The court stated that "recovery may be had upon proof that the publication was false, and that the defendant either knew it to be false, or, believing it to be true, lacked reasonable grounds for that belief." *Id.* at 198, 340 N.E.2d at 299. While not overruling *Troman*, *Colson* appears to undermine the earlier decision, as the court's analysis is much closer to the *Rosenbloom* public interest test than to the negligence test adopted in *Troman*. Colson v. Stieg, 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

Gertz analysis, disdained the public/private figure distinction.[80] The court held that:

> In reaching the accommodation between competing concerns, referred to in *Gertz*, the challenged statement must be assessed in the context in which it was published. The extent of the publication and those who were its recipients are subjects of primary consideration. Since whether or not one is defamed depends upon the effect the publication had upon those who received it, the statement must be capable of conveying a defamatory meaning to the hearer. The focus therefore must be upon the statement, and its predictable effect upon those who received the publication.[81]

The *Colson* court's framework has been labelled a "context public figure" approach by one commentator[82] because "[r]ather than focus exclusively on the private or public status of the person defamed, the *Colson* court focused on the statement, the audience, and the functional relationship between the two."[83] In the *Colson* case itself, this focus meant that a college professor, allegedly defamed by a statement to a four-person committee, became a "context public figure" who had to prove actual malice to obtain damages.[84] The allegedly defamatory statement in *Colson* was not made to the general public, but to the committee, a more limited audience. Moreover, the committee was engaged in evaluating academic performance, a matter that required open discussion and adequate "breathing space" for the free flow of information.[85]

Another approach was taken by the New York Court of Appeals in *Chapadeau v. Utica Observer-Dispatch, Inc.*[86] The *Chapadeau* court held that:

> [w]here the content of the article is arguably within the sphere of legitimate public concern . . . the party defamed may recover; however, to warrant such recovery he must establish by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.[87]

Under this standard, if a publisher utilizes "methods of verification that are reasonably calculated to produce accurate copy,"[88] it will escape liability. In elaborating on the gross negligence rule of *Chapadeau*, the court in *Karaduman v. Newsday, Inc.*[89] relied on basic first amendment freedoms, and stated that courts should not hesitate to grant summary judgments in favor of defendants in defamation cases since "the threat of being put to the defense of a lawsuit . . . may be as chilling

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80. Colson v. Stieg, 89 Ill. 2d 205, 213, 433 N.E.2d 246, 249 (1982).

81. *Id.* at 212, 433 N.E.2d at 249 (citations omitted).

82. Smolla, *Let the Author Beware: The Rejuvination of the American Law of Libel*, 132 U. PA. L. REV. 1, 71 (1983).

83. *Id.* at 73.

84. Colson v. Stieg, 89 Ill. 2d 205, 212–13, 433 N.E.2d 246, 249 (1982).

85. *Id.* at 212, 433 N.E.2d at 249. In American Pet Motels v. Chicago Veterinary Medical Ass'n, 106 Ill. App. 3d 626, 435 N.E.2d 1297 (1982), an Illinois appeals court refused to extend the *Colson* principles beyond the limits set out in *Colson*.

86. 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

87. *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

88. Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 541, 416 N.E.2d 557, 566, 435 N.Y.S.2d 556, 560 (1980) (interpreting Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975)).

89. *Id.*

to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself."[90]

IV. What Standard Should Be Applied?

The law of defamation attempts to reconcile two "mutually irreconcilable values":[91] society's interest in free discussion of information and ideas, and the citizen's interest in a reputation free from attack.[92] In furthering one of these interests, the other inevitably suffers.[93] This Case Comment suggests that the proper balance point should be "closer to the end representing prevention of self censorship"[94] than to the end representing protection of reputation. This is not to say that the interest in reputation is an invalid or inconsequential interest, for it most certainly is not:

> A person's standing in the community with his friends, neighbors—and prospective acquaintances—is of great value and he is entitled to have his relations with them unimpaired by defamatory harms. The regard of those about him more completely conditions his behavior than any other one factor, and it likewise adds more to his stature as a person than any other one factor.[95]

One commentator, through behavioral analysis, believes that a defamatory utterance is even more harmful than most people believe, in that more than the traditional notion of reputation is implicated:[96] The plaintiff "will *feel* hurt; . . . his expectations, his status, and maybe even his body and his economic interests are believed to have been hurt."[97] Although recognizing the importance of personal reputation, this Case Comment will offer the argument that first amendment values of free speech and discussion should take precedence over the interest in reputation.[98] The focus herein will be on those interests the law should and should not protect. Within this context, this Case Comment shall proceed to analyze critically the simple negligence formula adopted by Ohio in *Embers Supper Club* and shall propose viable alternatives that better advance societal interests.

A. *The Public Figure/Private Citizen Distinction*

First, the public/private figure distinction established by *Gertz* and adopted in *Embers Supper Club*[99] fails to provide an adequate framework for the protection of

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90. *Id.* at 545, 416 N.E.2d at 563, 435 N.Y.S.2d at 563 (quoting Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966).

91. Robertson, *supra* note 59, at 200.

92. *Id.*

93. *Id.*

94. *See* Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 Tex. L. Rev. 271, 271 n.3 (1976) [hereinafter cited as *A Response*].

95. Green, Malone, Pedrick, Rahl, Thode, Hawkins & Smith, Injuries to Relations 305 (1968).

96. Probert, *Defamation, A Camouflage of Psychic Interests: The Beginning of a Behavioral Analysis*, 15 Vand. L. Rev. 1173, 1175–85 (1962).

97. *Id.* at 1177 (emphasis in original).

98. *See infra* text accompanying notes 99–159.

99. Embers Supper Club v. Scripps-Howard Broadcasting Co., 9 Ohio St. 3d 22, 25, 457 N.E.2d 1164, 1167, *cert. denied*, 467 U.S. 1226, (1984); *see supra* text accompanying notes 13–19.

free speech. The Supreme Court has defined public figure so narrowly that relatively few individuals will meet the Court's standard, thereby precluding the actual malice protection to the press in most defamation suits. The Court in *Gertz* defined a public figure as follows:

> For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.[100]

While the definition is subject to a flexible interpretation, the Supreme Court has chosen to apply the public figure doctrine in a rigid, mechanistic fashion.[101] In the *Gertz* case itself, the plaintiff, Gertz, was a prominent Chicago civil liberties lawyer, who was a member of numerous boards and commissions in Illinois, had published books on civil rights matters, and had represented some very famous clients.[102] Still, the Court held that Gertz had not "thrust himself" into a public controversy, and thus was not a public figure.[103] Similarly, in *Time, Inc. v. Firestone*,[104] Mary Alice Firestone sued *Time* magazine because of statements *Time* had made concerning her divorce proceeding. The proceeding was widely publicized. Mrs. Firestone subscribed to a press clipping service chronicling her media exposure and held several press conferences during the divorce litigation in order to answer questions regarding the case.[105] The Court held that Mrs. Firestone was not a public figure; therefore *Time* magazine was not entitled to the *New York Times* standard.[106]

The Court justified this narrow public figure doctrine in part because it replaces the ad hoc judicial analysis that was required under the *Rosenbloom* "public interest" test,[107] in which a determination from the judge was sought on the question of whether the communication concerned a matter of public or general concern.[108] However, in determining the public or private status of an individual, the Court, in

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100. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

101. *See* Smolla, *supra* note 82, at 51–60.

102. Gertz v. Robert Welch, Inc., 418 U.S. 323, 330 n.3 (1974). See also Pember & Teeter, *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57, 75 (1974) for a full description of Mr. Gertz.

103. Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974); *see supra* note 56. *See also* Pember & Teeter, *supra* note 102, at 75 (arguing that Gertz was a public figure); Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 448–50 (1975) [hereinafter cited as *Self-Censorship*] (arguing that Gertz had voluntarily become a public figure for at least limited purposes).

104. 424 U.S. 448 (1976).

105. See Smolla, *supra* note 82, at 53 for a description of Mrs. Firestone's conduct during the trial. The Court determined that this conduct did not make Mrs. Firestone a public figure. Time, Inc. v. Firestone, 424 U.S. 448, 454–55 n.3 (1976).

106. Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976). See *supra* text accompanying notes 38–40 for a discussion of the *New York Times* standard. See *A Response, supra* note 94, at 272–76 for a criticism of the *Firestone* decision. For a further discussion of the narrow Supreme Court application of the public/private distinction, see Comment, *Defamation and the First Amendment in the 1978 Term: Diminishing Protection for the Media*, 48 U. CIN. L. REV. 1027 (1979) (The Comment analyzes Hutchinson v. Proxmire, 443 U.S. 111 (1979) and Wolston v. Readers Digest Ass'n, Inc., 443 U.S. 157 (1979).).

107. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). *But see* Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S. Ct. 2939, 2944 (1985) in which the Supreme Court reviewed the *Rosenbloom* public interest test in determining whether presumed and punitive damages should be awarded.

108. *See* text accompanying notes 48–51.

a threshold analysis, has inquired into whether or not that individual is involved in a public controversy,[109] thus creating the same ad hoc analysis it supposedly had abolished.[110] One commentator believes that the courts, of necessity, "will be unable to avoid resort, in one guise or another, to consideration of the 'public or general concern' in the subject matter."[111]

The ad hoc analysis engendered by the *Gertz* public figure doctrine has led to noticeably inconsistent application.[112] Some courts have used the restrictive view of *Firestone*[113] and have refused to find public figure status,[114] while other courts "have found the public figure classification broad enough to include a potpourri of passive, obscure plaintiffs."[115]

These inconsistent cases may reflect the courts' difficulty in applying the rigid rules of the public figure doctrine to the complex interrelationships of modern society. If the public figure doctrine is to be retained, there should be a liberalization in its application. First amendment freedoms should not depend on whether a person intended to enter a public controversy. Similarly, the fact that the controversy itself is not news of national import should not preclude constitutional protection. As examined earlier,[116] *Colson v. Stieg*[117] adopted a "context public figure" doctrine:[118]

> [This] concept recognizes that few Americans inject themselves into the public arena on a national level, thereby inviting scrutiny by national media outlets. . . . But events and controversies of interest to national or local media are by no means the only events and controversies that are both interesting and important to most Americans.[119]

Ordinary citizens become involved in the important institutions of society, such as school or the workplace, and in these localized contexts become public figures through their participation.[120] Since "robust exchanges of information are essential to the functioning of such institutions, . . . it is equitable to subject those who . . . enter controversies in such institutions to the heightened scrutiny."[121]

While a liberalized public figure doctrine would be an improvement on the

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109. See text accompanying note 100 for the public figure test employed by the Court in *Gertz*. One way to become a public figure is to thrust oneself in the forefront of a public controversy.

110. Woito & McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 210 (1979).

111. Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1218 (1976).

112. Comment, *supra* note 106, at 1037–38.

113. Time, Inc. v. Firestone, 424 U.S. 448 (1976). *Firestone*'s restrictive view was expanded upon in Hutchinson v. Proximire, 443 U.S. 111 (1979) and Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979). *See supra* note 106 and accompanying text.

114. *See, e.g.*, Ryder v. Time, Inc., 557 F.2d 824 (D.C. Cir. 1976) (finding a former elected representative and active politician not a public figure because he did not "thrust himself into the controversy"); Milkovich v. News Herald, 15 Ohio St. 3d 292, 294–98, 473 N.E.2d 1191, 1193–96 (1984) (finding a high school wrestling coach a non-public figure, despite the fact that the coach was renowned in the sports world and well known in the Cleveland area).

115. *See, e.g.*, Buchanan v. Associated Press, 398 F. Supp. 1196 (D.D.C. 1975) (finding an accountant with a firm that performed services for President Nixon's re-election committee a public figure, because campaign financing is a matter of public concern).

116. *See* text accompanying notes 79–85.

117. 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

118. This term was used by Smolla, *supra* note 82, at 68.

119. Smolla, *supra* note 82, at 75.

120. *Id. See also* Hill, *supra* note 111, at 1216–19 (endorsing a form of context public figure).

121. Smolla, *supra* note 82, at 75.

Court's current interpretation, complete rejection of the doctrine would better serve first amendment principles. The basic goal of the media should be to inform the public, regardless of whether public or private individuals are involved. This is not to say, however, that the public/private distinction is irrational.[122] Public figures such as politicians and entertainers are followed by the public with great interest, and this interest is translated into big business by the mass media.[123] In determining a defamation standard, however, courts should look to the first amendment and the interests it seeks to protect rather than to the public's identification with a famous person.

The first amendment should be read to protect society's right to be informed about any issue that is of public concern.[124] One commentator believes that the first amendment's right of expression has evolved from a speaker's right to speak to "an interest inhering in the body politic . . . an interest in hearing what is spoken, in being informed, rather than in speaking or communicating."[125] Viewed in first amendment terms, society's interest in a matter of public concern should not depend on whether an individual is a public figure or a private citizen.

Embers Supper Club illustrates this principle.[126] The station's broadcast attempted to inform the public of alleged illegal gambling activities at certain specified locations.[127] Illegal activity is a proper subject of public concern. That concern is not lessened when a private person rather than a public person engages in the illegal activity. The first amendment interest is in protecting the public's need for information concerning the activity itself. The public/private dichotomy leads to the result that a private citizen falsely accused of conducting an illegal activity could have a cause of action based on unfavorable media coverage, while a public figure, falsely accused of the same activity, and given the same treatment by the media would not. The harm to the public as a result of the alleged illegal activity is similar in either case, as is the public interest in being protected.[128] Therefore, the two situations should be given the same protection by the first amendment.

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122. See Robertson, *supra* note 59, for praise of the public/private distinction.

123. Sensationalist tabloids such as *The National Enquirer* capitalize on the public's interest in the famous. *See* Hunsaker, *Adequate Breathing Space in a Poisonous Atmosphere: Balancing Freedom and Responsibility in the Open Society*, 16 DUQ. L. REV. 9, 33 (1977) (people are concerned with personalities, not events).

124. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 89 (1975).

125. *Id.* at 42. Bloustein relies heavily on Alexander Meiklejohn's writings. *See* A. MEIKLEJOHN, POLITICAL FREEDOM (1960) and Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245.

126. Further examples include recent Ohio cases relying upon *Embers Supper Club*. *See* House of Wheat v. Wright, No. 8614 (Ohio Ct. App. Oct. 10, 1985) (available Feb. 1, 1985, on LEXIS) and Matalka v. Lagemann, 21 Ohio App. 3d 134, 486 N.E.2d 1220 (Ct. App. 1985).

127. *See supra* text accompanying notes 13–15.

128. The author realizes that when a public figure engages in an illegal activity and this activity is made known to the public, there is a violation of public trust that is not present in the private figure context. However, the author does not believe that this difference should lead to the widely differing standards employed in private as opposed to public figure situations.

B. *Problems with the Negligence Standard*

A simple negligence formula does not afford adequate first amendment protection. First, the concept of negligence is confusing and difficult to apply in the area of defamation.[129] The negligence standard adopted in *Gertz* must meet the constitutional purpose of preserving "a minimum area of 'breathing space' for the press."[130] Common law negligence, however, is a concept applied to specific fact situations, with little precedential value.[131] The law is made "*ex post facto* and *ad hoc*. . . . Uniformity and certainty of result are not only impossible but undesirable."[132] When applied to defamation cases, the uncertainty of this standard forces publishers to restrict their publications unduly, with the result that first amendment interests are compromised.[133] If the negligence standard is used, it must be defined more specifically than the common law concept.[134] However, the better strategy is to keep negligence out of defamation if at all possible, since it "threatens to confuse further what already is one of the most complex areas of the law."[135]

Another problem with the negligence standard is that it easily succumbs to strict liability application. While the *Gertz* opinion prohibited states from applying strict liability,[136] in practice, the negligence formula allows juries to apply their own form of strict liability in cases concerning private plaintiffs.[137] The jury must decide whether the media defendant acted as a reasonable person in ascertaining the truth or falsity of the publication. The problem, however, is that the jury has before it a "false"[138] statement. In hindsight, the natural proclivity of the jury is to equate a "false" publication with negligent reporting, thus implicitly using strict liability.[139] Once the jury concludes that the statement is false and that the defendant published it, liability automatically can be established by resort to the argument that the

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129. *See Self-Censorship, supra* note 103, at 458–69, and Hunsaker, *supra* note 123, at 30–32, both stating that the doctrine of negligence is not beneficial to the defamation area.

130. *Self-Censorship, supra* note 103, at 460.

131. *Id.*

132. Green, *The Duty to Give Accurate Information*, 12 UCLA L. Rev. 464, 470–71 (1965).

133. *Self-Censorship, supra* note 103, at 461. See also Hunsaker, *supra* note 123, at 30–32 for a discussion of the self censorship effect of the negligence rule.

134. *Self-Censorship, supra* note 103, at 461.

135. *Id.* at 425.

136. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974); *see supra* text accompanying note 58.

137. *See* Smolla, *supra* note 82, at 28.

138. A publication appears to become false when even minor discrepencies are found. *See A Response, supra* note 94, at 272–76 (analyzing the semantic errors which led to huge jury verdicts at the trial level in *Firestone* and *Rosenbloom*). In *Rosenbloom*, defendant's radio station described Rosenbloom as a "girlie book peddler." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 34 (1971). The Supreme Court described Rosenbloom as a "distributor of nudist magazines." *Id.* at 32. Professor Anderson argues that no liability would have attached if the radio station had used the Supreme Court language rather than its own. *A Response, supra* note 94, at 274. The error in *Embers Supper Club*, referring to a "bookie operation," is similar. Embers Supper Club v. Scripps-Howard Broadcasting Co., 9 Ohio St. 3d 22, 23, 457 N.E.2d 1164, 1167, *cert. denied*, 467 U.S. 1226, (1984). *See supra* text accompanying note 15. Anderson states that

> [c]ircumstances may exist in which the publisher has used reasonable care even though he made no effort to verify his statements—for example, the publication of reports based on official records, such as police reports and court documents. Absent any indication that the material is questionable, publication without further verification would be entirely reasonable.

Self-Censorship, supra note 103, at 466.

139. *See Self-Censorship, supra* note 103, at 465, and Smith, *The Rising Tide of Libel Litigation: Implications of the* Gertz *Negligence Rule*, 44 Mont. L. Rev. 71, 75 (1983).

defendant *must* have been negligent because publishers and broadcasters do not innocently disseminate defamatory falsehoods.[140]

This problem is exacerbated by the fact that media defendants are often large corporate entities, and plaintiffs are often individuals or smaller businesses, as in *Embers Supper Club*. As in other areas of tort law, the negligence standard permits the jury to make decisions based largely on the deep pocket theory.[141] Similarly, an anti-media bias appears to be pervading the country at present,[142] no doubt influenced by the poor journalism prevalent in the sensationalist tabloids. Juries, by use of the negligence standard, can translate their hostility towards the media into huge defamation judgments.[143] In recent years, the awards have skyrocketed, with the result that costs to the media have greatly increased.[144] The recent holding in *Greenmoss*, allowing awards of presumed and punitive damages without a showing of actual malice, promises to lead to even greater costs to the media.[145] One commentator has stated that "[a]s a matter of economics, . . . it is the law of defamation that is most critical to the survival of numerous newspapers and radio stations. The defamation questions of the next few years will test the very essence of the First Amendment."[146]

As a result of the high cost of libel litigation, the media must exercise restraint when presenting issues concerning "private figures," as the negligence rule awaits any mistakes. Business judgment may often dictate the decision to withhold publication of controversial stories based upon the potential damage award should some element of the story be proven false.[147] The media, therefore, is being forced into acts of self-censorship to protect its financial well-being regardless of the value certain stories may have to the public. "As a result of *Gertz* and *Firestone*, fear of litigation may force small newspapers and local radio stations to withhold newsworthy material."[148] In a society that gains much of its vitality from the free flow of information, this is a result that should not long be tolerated.[149]

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140. *Self-Censorship, supra* note 103, at 465.

141. Smolla, *supra* note 82, at 26.

142. *Id.*

143. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 367 (1974) (Brennan, J., dissenting).

144. *See* Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 797; Kupferberg, *Libel Fever*, COLUM. JOURNALISM REV., Sept.-Oct. 1981, at 36; and Smith, *supra* note 139, at 86–89.

145. *See supra* text accompanying notes 60–64.

146. Kovner, *Disturbing Trends in the Law of Defamation: A Publishing Attorney's Opinion*, 3 HASTINGS CONST. L. Q. 363, 372 (1976).

147. See *Self-Censorship, supra* note 103, at 430–34, for examples of situations where the media censored its reporting for fear of libel litigation.

148. Kovner, *supra* note 146, at 368.

149. James Hulme offers an interesting alternative to the present system of damage awards in defamation cases, arguing that the main constitutional criticism of the present defamation rules is that large damage awards lead to self-censorship of the media. Hulme, *supra* note 77, at 393–95. Therefore, damage remedies should be replaced with a "vindication action." *Id.* at 377. This action would be initiated after the defendant has made a statement about the plaintiff and refuses to retract it publicly. *Id.* at 392. The issue before the trier of fact simply would be the truthfulness of the defendant's statement. If the statement is found to be false, the plaintiff would receive a judgment declaring the statement to be false. In addition, the defendant would be ordered to circulate the judgment of falsity as extensively as was the publication of the defamatory statement. *Id.* This action, argues Hulme, vindicates reputation as well, if not better, than damages, without the constitutional problem of self-censorship. *Id.* at 393.

Other suggested non-damage remedies include injunctions, retraction statutes, reply statutes, and declaratory judgments. *Id.* at 386–90.

C. *Alternatives to the Negligence Standard*

Since the negligence standard often works in practice as a strict liability standard, with a built-in jury bias and potentially devastating consequences, the judiciary should counter this development with a more stringent standard of liability than simple negligence. Our constitutional framework expects that the judiciary, not the jury, will protect constitutional freedoms. Juries may be concerned with the immediate result of punishing the publisher, thereby demonstrating society's displeasure with the media industry, but courts should not fall victim to this vengeful spirit, particularly when first amendment freedoms are at issue. Courts should balance the immediate harm to society from defamatory statements against the ultimate harm to society from a weakened press. It is this Case Comment's position that the latter harm poses a far greater threat to society than the former.[150] Therefore, when the public interest merits discussion of the information contained in publication, the negligence standard should not be used and defendants should be granted summary judgment on the issue of defamation absent a showing of actual malice.

While the *Gertz* Court rejected this view,[151] this is the standard that best protects society's interests.[152] The determination of whether an issue is of public concern should be made by the judge in the particular case. If the judge finds that an issue of public concern is involved, and there is no showing of intentional falsehood or reckless disregard for the truth, then the defendant should be granted a summary judgment. If, on the other hand, the judge finds that the issue is not one of public concern, then the simple negligence standard should be used; any distinction between public and private individuals should be abolished, and the inquiry should focus on the event itself, not the persons involved.

This standard, which is basically that of the *Rosenbloom* plurality,[153] provides the protection needed for a free press, while also protecting the individual's interest in reputation. When an issue is one of public concern, the individual's reputation should be subordinated to society's need for a free flow of information. The vagueness of a reputational interest, as well as its fragile nature, militate against invoking this interest. If caution is not exercised in utilizing the reputational interest, a court may be compensating a perceived injury for which no recovery is warranted.

When an issue is not of public concern, however, the press should be held to a higher standard of care, and the interest in reputation takes on far greater significance. It is within this range of cases that the sensationalist journalist can, and should, be punished if he acts in a negligent manner. Citizens, both public and private,

150. See *supra* text accompanying notes 136–46 for a discussion of the potential for a weakened press engendered by the negligence standard.

151. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

152. It should be noted that in *Greenmoss*, the Court reinstated the public interest test into the law of defamation by determining that presumed and punitive damages could be awarded absent a showing of actual malice when the speech involves no matter of public concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S. Ct. 2939, 2944 (1985). It is interesting that the *Greenmoss* opinion was delivered by Justice Powell, who in *Gertz* had found the public interest test to be unworkable. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). Thus, it appears today that even the opponents of the public interest test concede that important distinctions should be based on whether a matter is of general public concern.

153. *See supra* text accompanying notes 48–54.

reasonably expect that their private lives are beyond the scope of the media. Thus, when the media delves into these areas, it must act reasonably.

The public interest test best balances the competing interests of reputation and free press, while also providing a workable framework for day-to-day litigation. However, since the Court disapproves of the test,[154] states may be reluctant to implement it.[155] Notwithstanding rejection of the public interest test, the negligence standard can be restructured more equitably. Currently, the focus of the test is primarily whether the defendant investigated the story in a sufficiently thorough manner. This ignores other significant considerations, however, such as the social importance of the speech. The Second Restatement of Torts explains that "[i]nforming the public as to a matter of public concern is an important interest in a democracy; spreading of mere gossip is of less importance."[156] Similarly, "[t]he seriousness of the allegation, . . . ought to be a primary touchstone in judging the gravity of the harm. . . . This self-evident proposition should not merely be a factor taken into account to mitigate damages; it should be part of the underlying calculation of fault."[157] Likewise, less care could be expected in a fast-breaking story that depends on immediate publication than is expected for a story that is developed over a longer period. Finally, the simple negligence test of *Embers Supper Club* and *Gertz* could be converted to a gross negligence standard of the type employed by New York.[158]

V. CONCLUSION

Justice Roberts, quoting *Cantwell v. Connecticut*, stated that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[159] The long view is necessary in defamation law in Ohio, as well as throughout the country. Freedom is maintained on too fragile a balance to endanger one of its major defenders: the press. James Madison, quoted by Justice Brennan in *New York Times*, stated that "[t]he people, not the government, possess the absolute sovereignty,"[160] and that the American system is based on the people's distrust of centralized power.[161] This

154. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

155. But see text accompanying notes 69–90 for states that have rejected the simple negligence standard and have adopted basically a *Rosenbloom* public interest test. States can form their own standard. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

156. RESTATEMENT (SECOND) OF TORTS § 580B, comment h (1977).

157. Smolla, *supra* note 82, at 85.

158. *See supra* text accompanying notes 86–90. *See also*, Note, *Defamation-Ordinary Negligence Standard Adopted in Ohio in Cases Involving Defamation of Private Persons*, 13 CAP. U.L. REV. 699, 705–06 (1984) (stating that the simple negligence standard adopted in *Embers Supper Club* should be replaced by a gross negligence standard).

159. New York Times v. Sullivan, 376 U.S. 254, 271 (1964) (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

160. New York Times v. Sullivan, 376 U.S. 254, 274 (1964) (quoting from 4 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION OF 1787, at 569–70 (1876)).

161. *Id.* David Anderson states that "permitting judges and juries to decide what the press may or may not publish, on pain of paying a libel judgment, is governmental control of the press, just as surely as would be a system permitting the executive to prohibit publication upon pain of paying a fine." *A Response*, *supra* note 94, at 271.

distrust of power should translate into a vigorous press that provides a check on the power of government, lest we lose the freedoms we so cherish, but often neglect.

The protection provided by an active press is especially important in our modern world. Technological advances have created a fast-paced society, in which there is a premium on rapid decision making. More than ever, the public needs all the information available to make rational decisions about the world in which they live. The media thus plays a vital role in modern society, even if it is conceded that the press often abuses its power. Individual instances of bad journalism do not justify an attack on the entire media industry. It seems far better to live with the occasional unpleasant and ill-advised news story than to limit the press to such an extent that it cannot do its job. In discussing the negligence formula in *Rosenbloom*, Justice Brennan stated that "in First Amendment terms, the cure seems far worse than the disease."[162] The *Gertz* opinion itself quoted James Madison's statement in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."[163]

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162. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47 (1971).

163. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (quoting from 4 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION OF 1787, at 571 (1876)).